



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Wilcox Industries Corporation

File: B-281437.2; B-281437.3; B-281437.4

Date: June 30, 1999

Robert F. Guarasi for the protester.

Patrick K. O'Keefe, Esq., and John M. Clerici, Esq., McKenna & Cuneo, for Insight Technology, Inc., an intervenor.

Susan Spiegelman-Boyd, Esq., Department of the Navy, for the agency.

Katherine I. Riback, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably found through testing that protester's submitted product sample did not comply with salient characteristics of the product.
 2. Protester whose product sample had been properly rejected as failing various salient characteristics of the product is an interested party to protest that the product samples of the awardee do not comply with the salient characteristics where the awardee is the only other offeror.
 3. Awardee's product sample cannot be said to satisfy salient characteristic where this matter was not tested as required by the solicitation and the protester has presented un rebutted evidence that there was a likelihood that the awardee's product sample would not meet this characteristic if tested.
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DECISION

Wilcox Industries Corporation protests the award of a contract to Insight Technology, Inc. under request for proposals (RFP) No. N00164-98-R-0094, issued by the Department of the Navy for laser borelights. Wilcox argues that its low-priced proposal was improperly rejected by the agency for not meeting the stated salient characteristics, due to testing irregularities and bias on behalf of the agency evaluators. Wilcox also argues that the awardee's proposed product did not meet certain stated salient characteristics.

We sustain the protest on the basis that Insight's product was not tested to ascertain compliance with certain salient characteristics required by the RFP.

The laser borelight is used to determine the accuracy of various weapons. Agency Report at 2. The operator inserts a mandrel into the barrel of the weapon and then inserts the laser borelight device onto the mandrel.¹ Agency Report, Tab 12, Laser Borelight Test Report, at 10. The type of weapon that is to be boresighted determines the type of mandrel that the operator uses. In other words, the operator would use one size mandrel for a .50 caliber weapon, and a different size mandrel for a 5.56mm weapon. These different size mandrels allow the same laser borelight device to be used on a variety of weapons.

The RFP was issued under the Streamlined Procedures for Evaluation and Solicitation for Commercial Items, Federal Acquisition Regulation (FAR) § 12.6 in a Commerce Business Daily (CBD) notice on June 5, 1998. The RFP, issued on a brand name or equal basis, contemplated the award of a fixed price supply contract for a 5-year period. RFP at 1-2. The RFP provided that the agency sought Insight Technology Part No. LSB-001 or equal equipment. The RFP advised that award would be made to the offeror whose proposal was most advantageous to the government, price and other factors considered. Proposals were to be evaluated under the following factors, listed in descending order of importance: product samples, past performance and price. The RFP required offerors to propose commercial items and to provide with their offer three product samples for testing which “shall be evaluated to determine compliance with [the] Brand Name or Equal salient characteristics.” Id. at 2. The RFP listed 15 salient characteristics, including salient characteristic No. 2, which states:

The standard shall include interfaces that boresight all 5.56mm, 7.62mm and .50 caliber weapons. The interface mechanisms shall be easily installed, removable and interchangeable. The interfaces shall not cause damage to weapon’s barrel. All interfaces shall retain adequate tightness when installed into the weapon’s barrel, including after repeated use.

Id. at 3.

The agency received proposals only from Wilcox and Insight by the June 23 due date. The agency performed technical, past performance, and price evaluations on both proposals, and determined not to hold discussions. On February 11, the agency issued amendment No. 5, which requested revised prices, based on a different

¹A mandrel is “the shaft and bearings on which a tool (as a circular saw) is mounted.” Webster’s Ninth New Collegiate Dictionary (1989).

quantity of the borelight devices.² Both offerors submitted revised prices by the February 18, 1999 due date. Wilcox's evaluated price was \$1,846,327 and Insight's evaluated price was \$2,476,102. The agency found no problems were reported regarding either offeror from the past performance references.

Based on its tests of the product samples, the agency determined that Wilcox's product failed to meet 8 of the 15 of the required salient characteristics. Agency Report at 9-11 and Tab 12. While several areas were only minor deviations necessitating minor redesign efforts, the agency also determined that several of the areas (salient characteristics 2, 4, 14) could only be remedied by a major redesign effort and that a redesigned product may no longer fit the definition of a modified commercial item as required by the RFP. Agency Report, Tab 10, Business Clearance Memorandum, at 7. The agency determined that Insight's product complied with all of the salient characteristics. Agency Report at 9-11 and Tab 12. On March 16, award was made to Insight. These protests followed.

For most of the salient characteristics, Wilcox disputes in detail the agency's determination that its product sample was noncompliant. However, Wilcox has not disputed that its product samples failed to meet salient characteristics No. 4 (the windage and elevation adjusters shall be tactile with increments of no more than .5 milliradians), No. 7 (laser beam divergence shall be no more than .8 milliradians), and No. 8 (safety labeling requirements). Protester's Comments, Apr. 26, 1999, at 4. Thus, based on this record, Wilcox product samples were properly found noncompliant and Wilcox's proposal was properly determined unacceptable.³

Wilcox nevertheless argues that these tests were performed in a biased manner due to the involvement of an evaluator who coordinated and performed testing of the product samples and was involved in a previous attempt to acquire the borelights on a sole source basis from Insight. In support of its allegations of bias, Wilcox points to the fact that one of the mandrels that was tested by the agency was returned to it "bent in a manner requiring significant force in an improper direction." Supplemental Protest at 4. According to Wilcox, "It is nearly impossible to bend the mandrel if used properly, since the mandrel is intended to be inserted in line with the barrel bore." Id. Wilcox also notes that one of the measuring cords that was attached to its product sample and used to determine 10 meters distance for sighting purposes, was returned to Wilcox "tangled and torn off the laser body, like a torn limb" Id. Wilcox also references an alleged additional "glove" test performed by the agency on Wilcox's

²Contrary to Wilcox's contentions, the agency did not conduct improper discussions with Insight when it advised that firm that it need not submit new product samples in response to amendment No. 5, which was silent on this point.

³Under the circumstances, we need not resolve whether Wilcox's product satisfies the other five salient characteristics with which it was found noncompliant.

product sample under salient characteristic No. 5, which is not stated in the RFP. Id. at 5.

We do not attribute unfair or prejudicial motives to government officials on the basis of inference or supposition; a protester must provide credible evidence clearly demonstrating bias and that the bias itself translated into action that unfairly affected the protester's competitive position. Rockhill Indus., Inc., B-278797, March 16, 1998, 98-1 CPD ¶ 79 at 3. Based on our review, we are not convinced that any agency bias unfairly affected the protester's competitive position.

The fact that the agency considered noncompetitively procuring the borelights from Insight is not itself evidence of bias. With regard to the damaged mandrels, the agency explains that this occurred when the Wilcox 5.56mm mandrel failed to insert into the 5.56mm weapon. Agency Report, Tab 12, at 3-4. The agency noted that a measuring cord on a Wilcox product sample tangled when it was unfurled in testing, so the agency removed it from the laser body so that the protective shield would close and the agency could continue to test the laser borelight device. Supplemental Agency Report at 8. Based on this record, we are not persuaded by Wilcox's assertion that these damages could only be caused by biased testing.

Next, Wilcox asserts that the agency added an additional requirement, a "glove" test, to salient characteristic No. 5, which required that the device shall allow the operator to determine the orientation of the laser device during lowlight and darkness. RFP at 3. This assertion arose from the agency statement that it considered Wilcox's alternate orientation method on its borelight, but found it to be faulty because it requires orientation using a knob that is tactilely similar to the unit's adjustment knobs, "especially when operator [is] using gloves." Agency Report at 9-10. The agency acknowledges that the solicitation did not explicitly state that an operator must be able to orient the laser borelight using gloves, but argues that given the low temperatures that the laser borelight device was required to operate under, it was not unreasonable to assume that the operator would be wearing gloves or to speculate that the orientation knob would be hard to distinguish from the adjustment knobs wearing gloves.⁴ Agency Supplemental Submission, May 26, 1999 at 2. The agency's explanation appears reasonable and does not evidence bias.

Wilcox also protests that Insight's product did not meet certain salient characteristics, most specifically salient characteristic No. 2 (quoted above). The agency and Insight

⁴ The RFP stated the temperature environment for operation of the borelights would range from -46 °C to +49 °C. RFP at 4.

argue that because Wilcox's product sample was properly found unacceptable, it is not an interested party to pursue a protest of the agency's evaluation of Insight's proposal.

Under our Bid Protest Regulations, an interested party is an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1999); see also 31 U.S.C. § 3551 (1994 & Supp. II 1996). Generally, a party will not be deemed to have the necessary economic interest to maintain a protest if it would not be in line for award if the awardee were eliminated from the competitive range. Eagle Mktg. Group, B-242527, May 13, 1991, 91-1 CPD ¶ 459 at 2.

Here, while the agency properly found that Wilcox's proposal was unacceptable because its product did not comply with the salient characteristics, Insight had submitted the only other proposal. Thus, if Insight's proposal was unreasonably evaluated by the agency to the extent that it should have been considered to be unacceptable (for example, if Insight's product also did not satisfy the RFP's salient characteristics), we would recommend that the agency reopen the competition to obtain revised proposals or resolicit the requirement. In either case, notwithstanding the unacceptability of its proposal, Wilcox may be in a position to either submit a revised proposal or participate in a resolicitation. Accordingly, Wilcox has a sufficient economic interest to maintain a protest of the evaluation of Insight's proposal, but only to the extent that Wilcox argues that Insight's proposal should have been rejected as unacceptable.⁵ See Eagle Mktg. Group., supra (protester whose proposal was found to exceed the available funding was an interested party to protest that the awardee was not eligible for the award of a contract under a solicitation issued as a small business set-aside). Thus, Wilcox is an interested party eligible to argue that Insight's product does not satisfy the salient characteristics.

As noted, Wilcox's protest focuses on salient characteristic No. 2, which requires the borelight to interface on 5.56mm, 7.62mm, and .50 caliber weapons and that "[t]he interface shall not cause damage to the weapon's barrel."⁶ RFP at 3. The protester included with his original protest letters from manufacturers of .50 caliber and

⁵While Wilcox argues that the agency improperly evaluated Insight's past performance, it does not assert that this rendered Insight's proposal unacceptable. Thus, Wilcox is not an interested party eligible to maintain such a protest and we will not consider it further.

⁶Wilcox also contends that Insight's borelight exceeds the 16-ounce maximum weight provided for salient characteristic No. 13. The record demonstrates that Insight's borelight satisfied this requirement. Agency Report, Tab 12, at 6. Moreover, in response to the protest, the agency reweighed the product sample and verified that this requirement had been satisfied. Agency Report at 19.

5.56mm weapons. These manufacturer letters state that a design, such as Insight's increases the likelihood of damage to the barrel. This is because the Insight product requires threading the laser body onto the mandrel, inserting the mandrel into the barrel, and rotating the entire unit (mandrel and borelight) to find the zero point of the weapon.⁷ Agency Report, Tab 12, at 10. The manufacturer of a .50 caliber weapon writes:

I find it highly objectionable to have a boresight device with any metal mandrel designed to turn its entire length within the M82 barrel, especially at the muzzle end. . . . If the mandrel is designed to turn in the weapon bore, it significantly increases the likelihood of damage to the barrel. Damage at the end of the barrel can significantly reduce accuracy of the weapon. If a barrel were to be damaged due to a soldier continuously turning a mandrel, this damage would not be covered under warranty.

Protest, Tab C, at 4.

Later, when the protester learned definitively that the agency did not test Insight's borelights with any .50 caliber weapons it then asked, "[i]f the Navy did not perform any tests on the M82 (a .50 caliber weapon), how did the Navy Technical Evaluator judge Insight compliant in these [s]alient [c]haracteristics?" and continues to argue that such a test would have damaged the barrel of the .50 caliber weapon.⁸ Protester's Comments, June 7, 1999, at 14.

The Navy concedes that it did not test the borelights with .50 caliber weapons, notwithstanding the RFP requirement that "Product Samples shall be evaluated to determine compliance with . . . salient characteristics."⁹ RFP at 2; Agency

⁷In contrast, the Wilcox product requires inserting the mandrel into the barrel, and then placing the laser body onto the mandrel. Then to find the zero point of the weapon, the operator rotates only the laser body. Agency Report, Tab 12, at 10-11.

⁸Since this argument was contained in Wilcox's initial protest with supporting evidence, we reject the agency's and Insight's arguments that this protest ground is untimely raised. Protest, at 4 and Tab C, at 4.

⁹The intervenor argues that the fact that the agency did not test the borelights with .50 caliber weapons is a nonissue because Insight proposed the brand name product "which, by definition, meets all of the salient characteristics." Insight Comments, June 17, 1999, at 17. We disagree. The fact that a brand name is designated does not necessarily mean that a proposal offering this item is acceptable; the salient characteristics must still be met. See, e.g., General Hydraulics Corp., B-181537, Aug. 30, 1974, 74-2 CPD ¶133 (bid offering brand name product is nonresponsive where the brand name does not meet the required salient characteristics); see also (continued...)

Supplemental Submission, June 14, 1999, at 6. In its responses to this issue, the Navy never argues that it no longer needed the laser borelights to interface with .50 caliber weapons and that this was why these weapons were not tested. The Navy also does not argue that the manufacturer's concerns about possible damage to barrels from the use of borelights designed like Insight's was not a valid concern.¹⁰ Thus, the record contains no evidence that Insight's borelight will interface with .50 caliber weapons without damage to the barrel and the record also contains the unrebutted opinion of the manufacturer of a .50 caliber weapon that a design such as Insight's significantly increases the likelihood of such damage.¹¹

Instead of asserting that tests using a .50 caliber weapon were not required, the Navy responds that it did not test .50 caliber weapons due to "safety considerations." Agency Supplemental Submission, June 14, 1999, at 7. The agency explains that these weapons were to be tested on its outdoor firing range in its facility in Crane, Indiana, but that in June 1998 testing on its only outdoor range was severely curtailed when it was discovered that the range had a serious potential for ricochet. The testing on the outdoor firing range at Crane was restricted until early September 1998 to only those weapons whose half maximum range was less than 6,041 feet. This temporary restriction effectively excluded the live testing of .50 caliber and 7.62mm weapons. Therefore, on August 26, 1998 only the 5.56mm weapons were ground impact fire tested on Crane's outdoor range using the borelight devices.¹² *Id.* at 8-9. The agency also notes that while one evaluator knew of the fact that .50 caliber weapons could

(continued...)

Lanier Bus. Prods., Inc., B-220610, Jan. 30, 1986, 86-1 CPD ¶110 (a protest that a bid offering a brand name product is nonresponsive for that reason is timely where filed within 10 days of when the protester was apprised that the agency considered such a bid to be responsive).

¹⁰As noted above, this particular design aspect is different for the Wilcox borelight.

¹¹ The Navy argues that the fact that it did not test .50 caliber weapons did not disadvantage Wilcox because the agency's test of 5.56mm weapons revealed no barrel damage from the use of Insight's borelight, even though Wilcox asserted that this should occur. We find no logic to this argument. The fact that the 5.56mm weapons were tested with the borelights and there was no detectable barrel damage does not necessarily suggest that there will be no barrel damage from Insight's borelight device to the .50 caliber weapons, given that different sized mandrels are used.

¹² The Navy notes that in early September 1998, Crane's new standard for live fire testing on the outdoor range was approved and that it allowed live fire testing of weapons such as the .50 caliber and the 7.62mm provided that the weapons were fired into an impact pit by a certified "expert" marksman and that the highway adjoining the firing range was closed. Agency Supplemental Submission, June 14, 1999, at 8.

not be fired on the outdoor range sometime shortly after July 21, 1998, the rest of the evaluators, including the particular evaluator that Wilcox argues is biased against it, were not aware of this development until the day of testing on August 26. Id. at 9.

While the agency explains the restrictions on firing .50 caliber weapons on its one outdoor firing range, it has never addressed why the live firing tests could not have been postponed until all three types of weapons could have been tested. Neither does the agency state why it was not possible to have these weapons tested on a different range that could accommodate .50 caliber weapons. The Navy also offers no other method to determine whether Insight's borelight device could interface with .50 caliber weapons and not cause damage to the barrel, as alleged by the protester, and confirmed by a manufacturer of .50 caliber weapons. Accordingly, we sustain the protest on this point.

We recommend that the agency perform the live firing tests with the product samples submitted by Insight on the .50 caliber weapons as contemplated by the RFP. If Insight's product fails this test, we recommend that the agency either terminate the firm's contract or, if the agency concludes that the requirement is not needed, amend the solicitation for both offerors. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing that portion of its protest that we sustained. 4 C.F.R. § 21.8(d)(1); see HG Properties A, L.P., B-277572 et al., Oct. 29, 1997, 97-2 CPD ¶ 123 at 6-7. In accordance with 4 C.F.R. § 21.8(f)(1), Wilcox's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States